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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION

19 In re CONSECO INSURANCE CO.
ANNUITY MARKETING & SALES
20 PRACTICES LITIG.

) No. C-05-04726-RMW

) CLASS ACTION

21 This Document Relates To:

22 ALL ACTIONS.

) PLAINTIFF'S NOTICE OF MOTION AND
) MOTION FOR CLASS CERTIFICATION,
) APPOINTMENT OF CLASS
) REPRESENTATIVE AND APPOINTMENT
23 OF CLASS COUNSEL

24 JUDGE: Hon. Ronald M. Whyte
25 DATE: October 8, 2010
26 TIME: 9:00 a.m.
27 CTRM: 6 – 4th Floor

28 **REDACTED**

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1 **TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD**

2 PLEASE TAKE NOTICE that on October 8, 2010 at 9:00 a.m. in Courtroom 6, Fourth Floor,
3 of the above-entitled Court, located at 280 South First Street, San Jose, California, plaintiff Robert H.
4 Hansen will move for an order certifying the following Classes and appointment as Class
5 representative:¹

6 **The Nationwide RICO Class:** All persons who, within the applicable statute of
7 limitations and while 65 years of age or older, purchased one or more Conseco
8 Insurance Company ("Conseco") deferred annuities either directly, or through the
surrender (in whole or part) of an existing life insurance policy, annuity, or other
investment, or by borrowing against an existing life insurance policy.

9 **The California Class:** All California residents who, within the applicable statute of
10 limitations and while 65 years of age or older, purchased one or more Conseco
11 deferred annuities either directly, or through the surrender (in whole or part) of an
existing life insurance policy, annuity, or other investment, or by borrowing against
an existing life insurance policy.

12 Additionally, pursuant to Federal Rules of Civil Procedure, Rule 23(g), plaintiff moves for an
13 order appointing the law firms of Robbins Geller Rudman & Dowd, LLP and Barrack Rodos &
14 Bacine as class counsel in this action.

15 **I. INTRODUCTION**

16 Conseco, along with its corporate affiliates, Conseco Services, LLC, and Conseco Marketing,
17 LLC (collectively "Defendants"), conspired with a network of sales agents to sell poorly-performing
18 deferred annuities to seniors citizens, using carefully-crafted sales materials that uniformly
19 misrepresented the annuities' true costs and other adverse features. Plaintiff now moves for class
20 certification as the evidence demonstrates that Conseco subjected all Class members to the same
21 false and misleading statements. Conseco in fact required all prospective purchasers to sign
22 standardized applications and "Benefit Summary and Disclosure" forms, acknowledging that they
23 received and reviewed the sales materials presented to them.

24
25 ¹ Plaintiff seeks certification of the following causes of action set forth in the Second Amended
26 Class Action Complaint, filed April 27, 2007: (i) Counts I & II, Violations of RICO 18 U.S.C.
27 §1962(b)-(d); (ii) Count III, Financial Elder Abuse, Cal. Welf. & Inst. Code §15600, *et seq.*;
28 (iii) Count IV, Violation of Cal. Bus. & Prof. Code §17200, *et seq.*; (iv) Count V, Violation of Cal.
Bus. & Prof. Code §17500, *et seq.*; (v) Count VIII, Fraudulent Concealment, Cal. Civ. Code §1710,
et seq.; and (vi) Count X, Unjust Enrichment and Imposition of the Constructive Test.

1 Consecos sales materials and annuity contracts are incredibly opaque and misleading,
2 making it impossible for average consumers, let alone elderly consumers, to understand its deferred
3 annuity products. Indeed, Consecos uniformly misrepresents and otherwise fails to disclose in its
4 written sales and policy forms the hefty commissions it pays to agents. These hidden agent
5 commissions, as well as other sales costs, serve to gut the annuities' value and performance, because
6 Consecos recovers those costs by manipulating the annuities' "product spread" – thereby reducing the
7 amount ultimately credited to purchasers. None of Consecos sales materials disclose the existence
8 of agent commissions and other costs embedded in its annuity products; nor do they disclose how
9 Consecos uses the product spread to recover those costs from Class members.

10 Consecos further misrepresents the so-called "bonus" it offers on its annuities in the form of
11 either a "premium credit" or "waiver" of the index margin. Because Consecos recoups the costs of
12 the premium credit and index margin waiver through the product spread – thereby passing such costs
13 on to Class members – those features fail to provide any real value. Again, none of this is disclosed
14 to Class members.

15 Certification of both Classes is appropriate because this case involves a common course of
16 conduct arising from Consecos uniform sales materials, from which Consecos sales agents could not
17 deviate. Recently, in a very similar case, the Ninth Circuit reversed the denial of class certification and
18 certified a Hawaii class of purchasers of Midland National deferred annuities. *Yokoyama v. Midland*
19 *Nat'l Life Ins. Co.*, 564 F.3d 1087 (9th Cir. 2010). The Ninth Circuit found that plaintiffs' claims were
20 based on "standardized written materials given to all plaintiffs" and therefore "[p]laintiffs' case will
21 not require the fact-finder to parse what oral representations each broker made to each plaintiff." *Id.* at
22 1093. The same reasoning applies here.

23 A number of district courts have also certified classes involving very similar, if not identical,
24 annuity sales claims. See *Negrete v. Allianz Life Ins. Co.*, 238 F.R.D. 482, 496 (C.D. Cal. 2006)
25 (certifying nationwide RICO class and California class of senior purchasers of Allianz annuities);
26 *Iorio v. Asset Mktg. Inc.*, No. 05CV633 IEG (CAB), 2006 U.S. Dist. LEXIS 94948, at *21 (S.D. Cal.
27 July 26, 2006) (certifying statewide California class of senior purchasers of Allianz annuities);
28 Exs. 1, 2, *American Investors Cases II*, JCCP No. 4441, Order Granting Class Certification and

1 Notice of Pendency of Class Action (Cal. Sup. Ct. San Francisco, Nov. 21, 2008) (certifying
2 California class of senior purchasers of American Equity annuities); Ex. 14, *Clark v. Nat'l W. Life*
3 *Ins. Co.*, BC321681 (Cal. Super. Ct., Los Angeles Cty., Feb. 28, 2007) (certifying California class of
4 senior purchasers of National Western annuities).²

5 This case fits squarely within well-established case authority certifying claims based on uniform
6 misrepresentations utilized in the sale of deferred annuities. Plaintiff here can and will demonstrate at
7 trial, through evidence common to the Classes, that Conseco and its corporate affiliates orchestrated an
8 overarching scheme targeting seniors in which it uniformly misrepresented certain annuity features such
9 as the premium credit and index margin waiver and concealed the annuities' commission and sales
10 costs. The common evidence includes Conseco's standardized sales materials and contracts, internal
11 company documents, the testimony of its senior executives, the declaration of the Class representative
12 Robert Hansen, and the declaration of plaintiff's expert actuary, Jeffrey K. Dellinger, FSA, MAAA.
13 Based on this common, classwide evidence, this case plainly meets the requirements of Rule 23.

14 **II. STATEMENT OF COMMON FACTS**

15 The predominant legal and factual issues in this litigation, common to plaintiff and all Class
16 members, include: (a) Conseco and its co-conspirators' use of standardized written sales materials to
17 defraud senior investors, (b) Conseco's common misrepresentations and omissions concerning the
18 key features of its deferred annuities; and (c) the existence, composition and common purpose of an
19 ongoing RICO Enterprise and conspiracy.

20 **A. Conseco Requires That Its Sales Agents Use Standardized Sales** 21 **Materials from Which They Cannot Deviate**

22 Since the mid-1990's, Conseco targeted senior citizens in the sale of deferred annuities
23 because that is "where the money is." Ex. 3, Hilbert Article, "Senior Market Focus of Conseco
24 Deal"; Ex. 4, CIC00064556-60 ([REDACTED]
25 [REDACTED]); Ex. 5, CIC00064467-68. In its internal pricing documents, Conseco [REDACTED]

26 ² All "Ex." And "Exs." Are the exhibits attached to the Declaration of Phong L. Tran in
27 Support of Plaintiff's Motion for Class Certification, Appointment of Class Representative and
28 Appointment of Class Counsel, filed concurrently.

1 [REDACTED]
2 [REDACTED]. Ex. 6, CIC00058246-82 at 58271; *see also*
3 Ex. 7, CIC00058714-17 ([REDACTED]).

4 Consecro utilizes a network of marketing organizations and affiliated sales agents to capture the
5 lucrative senior market. Ex. 9, Kindig Depo. at 109:7-9; 120:4-121:2. Consecro strictly controls the
6 manner in which its annuity products are marketed, presented and sold and therefore does not allow
7 agents to deviate from Company-approved standardized sales and product materials and its approved
8 sales process. Ex. 10, CIC00265390-98 at 94 ([REDACTED]
9 [REDACTED]). These standardized materials include the annuity application, product brochure, and a "Benefit
10 Summary and Disclosure" form. Ex. 11, CIC00000030 (executed Benefit Summary and Disclosure
11 Form for plaintiff Hansen); Ex. 12, CIC00013680-87 (Agent Guide for Consecro Choice equity-
12 indexed fixed annuity).

13 Consecro will not issue any annuity contract unless the Benefit Summary and Disclosure
14 Form and application are *signed by both the agent and the purchaser*. Ex. 13, Ardizone Depo. at
15 49:25-50:5; 81:16-23 (explaining that Consecro refuses to process the application until the agent
16 obtains the fully executed paperwork). Consecro in fact requires each agent to certify on the
17 disclosure form "*that I [the agent] have explained the contents of the [disclosure] to the applicant*"
18 *and "have not made statements contradicting those in this document."*³ Ex. 11, CIC00000030
19 (executed disclosure form for Hansen); Ex. 13, Ardizone Depo. at 80:5-81:1 (use of disclosure forms
20 was mandatory for *all* Consecro annuity products). Shawn Ardizone, Director of Field Sales Support,
21 confirmed at deposition that agents are forbidden to make oral representations that differ from
22 Consecro's disclosure form and other sales materials:

23 Q Would you say that one of the reasons for the disclosure form was also to
24 make sure that the agent stuck closely with the information that was provided
in the disclosure form in relaying it to the customer?

25 A Correct.

* * *

26 _____
27 ³ Unless otherwise noted, citations are omitted and emphasis is added.
28

1 Q Was one of the purposes of having them do this – having the agents do this so
2 that they confirm they were not making oral representations that were
3 different than what Conseco felt were the important representations to make
4 to the customer?

5 A Correct.

6 Ex. 13, Ardizone Depo. at 82:24-83:24; 85:17-86:5.

7 Conseco likewise requires all prospective purchasers to sign the disclosure form, attesting
8 that they “read” and “understand” the sales materials presented to them. Ex. 11, CIC00000030.⁴
9 Conseco implemented this policy so that “the customer [would] go through and understand the
10 product.” Ex. 13, Ardizone Depo. at 83:3-11; 85:4-6 (disclosure form “is designed to describe the
11 features of the product”).

12 Conseco therefore relies exclusively on these standardized written sales materials – from
13 which agents may not deviate – to sell its deferred annuities – and to ensure that all Class members
14 were subject to the same misrepresentations and omissions, as discussed below.

15 **B. Conseco’s Standardized Sales Materials and Contracts Misrepresent**
16 **and Fail to Disclose Material, Adverse Facts About Its Annuities**

17 To appeal to seniors, Conseco portrays its deferred annuities as advantageous retirement
18 investment products that provide competitive, tax-advantaged returns and “[m]arket-like growth,”
19 without any “downside” risk. Ex. 27, CIC00013697-98. Conseco also promises to increase the
20 value of its annuities at the time of purchase by offering a “premium credit” on its fixed interest
21 annuities, or by “waiving” the index margin on its EIAs. *Id.* at CIC00013700; Dellinger Decl.,
22 ¶¶37-38. But, as discussed below, the representations in Conseco’s written sales materials and
23 contracts are misleading because they misstate how the annuities actually work and conceal their
24 adverse features, particularly their high embedded costs and poor performance.

25
26
27 ⁴ See also Exs. 15-26, CIC000025238-43, CIC00059255-59, CIC00121930-35, CIC00063868-
28 72, CIC00018050-53, CIC00056533-34, CIC00192052, CIC00010252-55, CIC00019764-68,
CIC00014579-83, CIC00116116-21, CIC00017563.

1 **1. Conseco Uniformly Misrepresents and Otherwise Conceals Its**
2 **Annuities' Sales Charges and High Commission Costs**

3 First, Conseco deceives Class members by misrepresenting and otherwise failing to disclose in
4 its standardized sales forms and contracts that its annuities are encumbered by significant sales loads,
5 including substantial commission costs and other acquisition expenses. Ex. 28, Turner Depo. at 47:20-
6 48:5 ([REDACTED]). *Id.* at 23:7-11 ([REDACTED]).
7 [REDACTED]). These hidden costs, in turn, substantially impair the value
8 and performance of the annuities sold to Class members. Dellinger Decl., ¶34-35.

9 Conseco's agent commissions account for the largest component of its sales costs. Dellinger
10 Decl., ¶26. On average, Conseco pays agents an [REDACTED] commission. And, [REDACTED]
11 [REDACTED]. Dellinger Decl., ¶¶25-26. Conseco in
12 fact represents to sales agents that it offers the "[REDACTED]" on its deferred annuity products.
13 Ex. 29, CIC00025346; Ex. 30, CIC00051255-60 ([REDACTED]
14 [REDACTED]) (emphasis in original); Ex. 31, CIC00209171 ([REDACTED]
15 [REDACTED]); Ex. 30, CIC0051255-60; Ex. 32, CIC00021903 ([REDACTED]
16 [REDACTED]).

17 Purchasers of Conseco annuities must ultimately pay for these commissions. Conseco treats
18 agent commissions as [REDACTED]
19 [REDACTED] – the period in which the annuity is subject to surrender charges. The product
20 spread is the difference between [REDACTED]
21 [REDACTED]. Ex. 28, Turner Depo. at 14:4-17; 23:7-11; 25:21-26; Dellinger
22 Decl., ¶¶18-20, 25, 32-36. Conseco therefore recovers [REDACTED]
23 [REDACTED].
24 [REDACTED]. Dellinger Decl., ¶¶34-36. Gregory Turner, Conseco's Vice-President of
25 Life and Annuity Product Management and actuarial designee, confirmed that [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 Ex. 28, Turner Depo. at 45:17-46:23.

11 Consecro charges a target product spread [REDACTED], which
12 it keeps for itself by deducting the spread amount from the returns on the investments backing its
13 deferred annuity products. Ex. 33, CIC-MLLC-JUR 0014175-206; Dellinger Decl., ¶¶18, 32. The
14 spread is intended to cover [REDACTED]
15 [REDACTED]. Ex. 28, Turner Depo. at 23:7-11; Dellinger Decl., ¶18. To achieve its target
16 product spread, Consecro routinely adjusts the credited interest rates, thereby lowering the amounts
17 credited to the annuities. Ex. 34, CIC00062662 ([REDACTED]o);
18 Ex. 35, CIC00055248 ([REDACTED]). Thus, Consecro effectively
19 treats agent commissions and other acquisition expenses as sales charges to be paid by the purchaser.
20 Ex. 28, Turner Depo. at 23:7-11.

21 Consecro uniformly misrepresents and fails to disclose agent commissions, as well as the fact
22 that it recoups the cost of such commissions through the product spread. Ex. 27, CIC00013696-707.
23 Turner acknowledged [REDACTED]
24 [REDACTED]. Ex. 28, Turner Depo. at 48:14-23.

25 Consecro's failure to disclose its commissions and other acquisition charges and the fact that
26 those costs come out of the purchaser's pocket raise issues common to every Class member.
27
28

1 2. **Conseco Misrepresents the First Year "Premium Credit" and**
2 **"Waiver" of the Index Margin**

3 Conseco also deceives Class members by promising a first year "additional 3% premium
4 credit" on a number of its fixed interest annuities. Ex. 27, CIC13700. Conseco similarly promises to
5 "waive" the first year index margin on certain of its EIAs. *Id.* Conseco uses the lure of the first year
6 premium credit and index margin waiver to dupe investors into believing they will receive an added
7 bonus on its annuities at the time of purchase. *Id.* However, the premium credit and index margin
8 waiver are nothing more than deceptive teaser rates that fail to provide any real enhancement to the
9 annuities' value and performance. Ex. 28, Turner Depo. at 50:1-10, 50:25-51:6, 53:7-11; Dellinger
10 Decl., ¶¶37-46.

11 Conseco's promise of a first year premium credit is false and misleading because, just like
12 agent commissions, Conseco [REDACTED].

13 The premium credit is therefore illusory, as Conseco [REDACTED]
14 [REDACTED]. Dellinger Decl., ¶¶39-41. Turner confirmed at deposition
15 that [REDACTED]

16 [REDACTED]. Ex. 28, Turner Depo. at 50:1-10, 50:25-51:6,
17 53:7-11. Purchasers of premium credit annuities therefore receive a significantly lower credited
18 interest rate than purchasers of products without the premium credit. Turner again confirmed this:

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 Ex. 28, Turner Depo. at 50:1-10; Dellinger Decl., ¶41, 45.

25 Conseco's index margin "waiver" is misleading and illusory for the same reason. The index
26 margin is one of the policy "levers" Conseco uses to control the amount credited on its EIA
27
28

1 products.⁵ Ex. 28, Turner Depo. at 21:24-23:10. The index margin, which is reflected as a
2 percentage, is an additional amount (along with the spread) that Conseco deducts from its investment
3 yield, leaving the remaining amount to be credited to purchasers.⁶ Conseco uniformly represents in
4 its sales materials that the index margin will be waived for the first year of the annuity contract,
5 providing purchasers with a higher credited interest amount. This is false and misleading because
6 Conseco increases the spread in subsequent contract years to recover the additional amount credited
7 to purchasers from the index margin waiver in the first year. Dellinger Decl., ¶¶41, 46. Turner
8 again confirmed this:

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 Ex. 28, Turner Depo. at 41: 24-42:14.

20 Accordingly, neither the index margin waiver nor the premium credit provide any real value
21 or benefit, as the costs of both are charged against purchasers through lower crediting rates.
22 Dellinger Decl., ¶¶42-46. And, just like Conseco's hidden commissions, the Company uniformly
23 fails to disclose the costs associated with the index margin waiver and premium credit or their
24

25
26 ⁵ Other product levers used by Conseco to manage its EIA products include index the cap and
27 participation rate. Ex. 28, Turner Depo. at 21:24-22:10.

28 ⁶ Mr. Hansen purchased a Conseco Choice annuity, which had an index margin of 15%.

1 impact on the product spread and crediting rate. Ex. 28, Turner Depo. at 53:12-19 ([REDACTED]

2 [REDACTED]).

3 **C. The RICO Enterprise**

4 The RICO Enterprise here is comprised of Conseco, Conseco Services, Conseco Marketing,
5 and their tightly-controlled network of marketing organizations and sales agents who target senior
6 citizens in the sale of deferred annuities. Complaint, ¶¶105-116. In its September 30, 2008 Order,
7 this Court held that plaintiff had successfully pled a RICO Enterprise under *Odom v. Microsoft*
8 *Corp.*, 486 F.3d 541 (9th Cir. 2007), the controlling Ninth Circuit authority.

9 As discussed above, plaintiff has alleged a direct and indirect subsidiary
10 relationship between Conseco, CIC, Conseco Marketing, Conseco Services and 40/86,
11 thereby successfully alleging an ongoing organization. Plaintiff has also made
12 allegations regarding how the Conseco Group operates to facilitate defendants' alleged
fraudulent scheme, alleging a common purpose, and that the alleged improprieties
regarding the sale of annuities to seniors continue over time satisfying the requirement
that plaintiff make sufficient allegations that the enterprise is a continuing unit.

13 *In re Conseco Ins. Co. Annuity Mktg. & Sales Practices Litig.*, No. C-05-04726 RMW, 2008 U.S.
14 Dist. LEXIS 111497, at *28-*30 (N.D. Cal. Sept. 30, 2008).

15 The common, classwide evidence offered by plaintiff amply supports the allegations in the
16 Complaint and demonstrates Defendants' involvement in an ongoing enterprise with the common
17 purpose to sell Conseco deferred annuities to seniors. This evidence includes, among other things,
18 documents and testimony from Conseco regarding its contractual relationships with its NMOs and
19 sales agents,⁷ the co-development of new deferred annuity products to be sold by Conseco,⁸ control of
20 its sales agents through marketing and sales production requirements,⁹ the substantial compensation
21 paid to agents,¹⁰ and the Company's internal pricing and marketing strategies memoranda.¹¹

22 _____
23 ⁷ Ex. 10, DNA000025-41; Ex. 36, CIC00032001-05; Ex. 13, Ardizone Depo. at 28:11-22
24 ([REDACTED]).

25 ⁸ Ex. 13, Ardizone Depo. at 135:21-136:17, 211:25-212:3.

26 ⁹ Ex. 10, DNA000025-41; Ex. 36, CIC00032001-05.

27 ¹⁰ Dellinger Decl., ¶¶25-28.

28 ¹¹ Ex. 4, CIC00064556-60 at 56 ([REDACTED])

1 Because all class members share a common interest in demonstrating the existence of the
2 enterprise and the conspiracy that impacted them, plaintiff's claims present common issues
3 susceptible to class treatment.

4 **III. THE REQUIREMENTS OF RULE 23(a) HAVE BEEN MET**

5 Plaintiff can readily demonstrate the four elements of Rule 23(a): (a) numerosity of Class
6 members; (b) commonality of claims or issues; (c) typicality of plaintiffs' claims; and (d) adequacy
7 of representation by plaintiffs and class counsel.¹² Fed. R. Civ. P. 23(a).

8 **A. Numerosity**

9 Rule 23(a)(1) requires "the class is so numerous that joinder of all members is impracticable."
10 Here, Conseco's electronic business records establish that the nationwide RICO Class encompasses
11 approximately [REDACTED] annuity policies. Dellinger Decl., ¶23. The proposed California Class
12 encompasses approximately [REDACTED] annuity policies. *Id.*; Ex. 37, Conseco Life Insurance Company's
13 Response to Plaintiffs' First Set of Interrogatories at 4-5. Numerosity is easily satisfied. *See*
14 *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 997 (9th Cir. 2007) (numerosity satisfied where
15 there was potentially thousands of eligible class members).

16 **B. Commonality**

17 The liberally-construed standard of commonality requires the existence of "only a few
18 common legal and factual issues." *Negrete*, 238 F.R.D. at 488. Under the "common course of
19 conduct" test applied by the Ninth Circuit, class certification is appropriate where consumers are
20 "allegedly defrauded over a period of time by similar misrepresentations." *McPhail v. First*
21 *Command Fin. Planning, Inc.*, 247 F.R.D. 598, 609 (S.D. Cal. 2007).

22
23 [REDACTED]; Ex. 3, Hilbert Article (senior citizens are
24 "the best marketplace in the industry" because "that's where the money is").

25 ¹² Very recently, an *en banc* panel of the Ninth Circuit clarified Rule 23's standards for class
26 certification in *Dukes v. Wal-Mart Stores, Inc.*, Nos. 04-16688, 04-16720, 2010 U.S. App. LEXIS
27 8576 (9th Cir. Apr. 26, 2010), a Title VII sex discrimination action. In *Dukes*, the Ninth Circuit
28 emphasized that the class certification analysis must focus on whether the plaintiff has raised
common, classwide claims, not whether the plaintiff will in fact prevail on such claims. *Id.* at *35,
*42-*43. Accordingly, a district court may only conduct a factual analysis to the extent it is
absolutely "necessary" to decide the requirements of Rule 23. *Id.* at *36 n.8.

1 Commonality is readily met here because plaintiff's claims are based on defendants'
2 common course of conduct to market and sell Conseco deferred annuities to senior citizens based on
3 certain misrepresentations and omissions. *Negrete*, 238 F.R.D. at 488. Conseco represents through
4 its standardized written materials that its deferred annuities are safe, secure and competitive, when in
5 fact, they are poorly performing products that are burdened with excessive, undisclosed commissions
6 and other expenses. Moreover, Conseco deceives purchasers by claiming that its annuities offer a
7 first year "premium credit," or "waiver" of the index margin, when in fact those features offer no
8 real benefit and must be ultimately recouped from purchasers. Thus, these fundamental
9 misrepresentations and omissions, which are also discussed in §IV.A.1, in connection with the issue
10 of Rule 23(b)(3) predominance, are uniform and apply to all Class members.

11 **C. Typicality**

12 Typicality under Rule 23(a)(3) is satisfied where the named plaintiff's claims are reasonably
13 co-extensive with absent class members' claims, even if the claims are not substantially identical.
14 *Negrete*, 238 F.R.D. at 488. The element is met here as the claims of the Class representative are
15 precisely the same as those of the proposed Classes, *i.e.*, they arise from the same overarching
16 fraudulent scheme and course of conduct affecting all Class members. Indeed, "[t]he same sales
17 pitch, strategy, and scheme that injured the named plaintiffs likewise injured the absent class
18 members." *McPhail*, 247 F.R.D. at 610.

19 The Class representative here, Robert Hansen, at age 68, surrendered an existing annuity and
20 used the proceeds of \$108,194.24 to purchase a Conseco Choice equity-indexed annuity in March
21 2000. Ex. 38, CIC00000019; Ex. 39, CIC0000002-4. During the sale, Robert Zehner, a Conseco-
22 appointed agent, presented Mr. Hansen with Conseco's standardized sales materials, including the
23 annuity application and Benefit Summary and Disclosure form. Hansen Decl., ¶5; Ex. 11,
24 CIC00000030-32 at 32. Mr. Hansen signed the application and disclosure form, affirming he
25 received and reviewed Conseco's written materials. Hansen Decl., ¶¶5-6.

26 The Conseco Choice annuity purchased by Mr. Hansen featured a first year "premium credit"
27 of 3% if he elected the fixed interest option, or first year index margin waiver if he elected the equity
28 index option, the latter option of which he chose. The annuity also imposed high surrender charges

1 (starting at 20% for 15 years). Ex. 11, CIC00000030-32. Mr. Hansen did in fact surrender the
2 Conseco annuity in 2004 and incurred a 20% surrender charge, leaving him with a cash amount of
3 \$91,566.26 – much less than his original premium amount. Ex. 8, CIC00000305. He therefore
4 suffered a *return of negative 4.09%* on his investment. Complaint, ¶99.

5 Significantly, the sales materials and the annuity contract provided to Mr. Hansen failed to
6 disclose the high commissions and other acquisition expenses embedded in the annuity, the costs of
7 which Conseco recouped through its product spread and surrender penalties. Ex. 27, CIC00013696-
8 707. The Conseco materials also misrepresented and concealed cost of the index margin waiver,
9 which similarly was passed on to the purchaser. *Id.* Mr. Hansen therefore asserts claims that are
10 typical of those asserted by the proposed Classes.

11 **D. Adequacy and the Appointment of Class Counsel**

12 The relevant inquiry for adequacy under Rule 23(a)(4) is whether “the named plaintiffs and
13 their counsel have any conflicts of interest with other class members,” and whether “the named
14 plaintiffs and their counsel prosecute the action vigorously on behalf of the class.” *Hanlon v.*
15 *Chrysler Corp.* 150 F.3d 1011, 1020 (9th Cir. 1998). As discussed above, the interests of Mr. Hansen
16 and the proposed Classes are fully aligned in determining whether Conseco misrepresented the
17 products sold to them. Indeed, Mr. Hansen is a senior citizen who purchased a Conseco annuity,
18 after being presented with standardized sales materials containing false and misleading statements.
19 Adequacy is surely met here because there are no ““antagonistic or conflicting”” interests between
20 the representative and proposed Classes. *See McPhail*, 247 F.R.D. at 611.

21 Likewise, adequacy is plainly met with plaintiff’s counsel. The undersigned counsel – Barrack
22 Rodos and Robbins Geller – have already been appointed by the Court to serve as Interim Co-Lead
23 Class Counsel, and both firms have demonstrated that they are highly capable and willing to
24 vigorously, efficiently and expeditiously prosecute this class action. *See* Dkt. No. 34, Notice of Entry
25 of Order regarding appointment of interim co-lead class counsel, entered April 14, 2006; *see also*
26 *Negrete*, 238 F.R.D. at 488-89 (finding predecessor firm, Coughlin Stoia, to be adequate class
27 counsel). The resumes and biographies of these firms (Exs. 40, 41) reflect their substantial experience
28

1 and success in prosecuting large, complex class actions similar to the instant case. There is no
2 question that plaintiff and his counsel will capably represent the Classes here.

3 For the same foregoing reasons, plaintiff makes the related request for the appointment of
4 Barrack Rodos and Robbins Geller as co-lead counsel for the Classes, pursuant to Rule 23(g).

5 Because plaintiff can demonstrate numerosity, commonality, typicality and adequacy, all of
6 the requirements of Rule 23(a) are satisfied.

7 **IV. RULE 23(b)(3) IS SATISFIED FOR THE FEDERAL RICO AND** 8 **CALIFORNIA STATE LAW CLASSES**

9 Under Rule 23(b)(3), certification is appropriate if: (a) questions of law or fact common to
10 the members of the class *predominate* over any questions affecting only individual members; and
11 (b) the class action is *superior* to other available methods for the fair and efficient adjudication of the
12 controversy. *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244
13 F.3d 1152, 1162-63 (9th Cir. 2001). Because Conseco sold its deferred annuities based on uniform
14 misrepresentations and omissions in its standardized, written materials, plaintiff satisfies both
15 predominance and superiority.

16 **A. Predominance Is Satisfied**

17 **1. Conseco's Uniform Misrepresentations to the Classes Establish** 18 **Predominance**

19 Predominance is surely met here because plaintiff's claims are based on a common scheme
20 and course of conduct, devised and orchestrated by Conseco and its corporate affiliates to
21 misrepresent the essential characteristics and true costs of Conseco deferred annuities. *See Negrete*,
22 238 F.R.D. at 495 (certifying a nationwide RICO class of seniors who purchased costly and inferior
23 Allianz deferred annuities based on misrepresentations and omissions in Allianz's uniform sales
24 materials); *Yokoyama*, 594 F.3d 1087 (certifying class of senior citizens who alleged
25 misrepresentations in defendant's annuity sales brochures).

26 Here, Conseco presented all Class members with standardized sales materials that
27 misrepresented and concealed the high embedded costs of its annuities, particularly the excessive
28 commissions paid to its sales agents. Conseco further deceived Class members by promising an
illusory first year bonus in the form of a "premium credit" or index margin "waiver." Nowhere in its

1 sales materials or annuity contracts did Conseco disclose that it fully recovers the costs of the hidden
2 commission charges and the “bonus” features from Class members. Indeed, Conseco secretly
3 manipulated and increased the product spread on its annuities to extract those various costs from Class
4 members, thereby substantially lowering the interest ultimately credited to them. Ex. 28, Turner Depo.
5 at 71:18-21; Ex. 34, CIC00062662; Ex. 35, CIC00055248. Conseco never disclosed how the
6 imposition of the product spread impairs the value and performance of Class members’ annuities.
7 Ex. 28, Turner Depo. at 13:18-23.

8 To ensure this scheme was uniformly implemented, Conseco required its sale agents to
9 strictly adhere to its written sales materials and contracts. Indeed, for every annuity sale, Conseco
10 sales agents were required to sign the Benefit Summary and Disclosure form and affirm that they
11 made no statement “contradicting” the Conseco sales materials. Ex. 43, CIC00265390-98; Ex. 23,
12 DNA000032. Moreover, Conseco required all Class members to sign the same disclosure form, as
13 well as the annuity application, affirming they “read” and “understand” the sales materials presented
14 to them. *See, e.g.*, Ex. 11, CIC00000030-32.

15 Accordingly, through its carefully-crafted sales materials – provided to all Class members at
16 the time of sale – Conseco concealed the hidden commissions and other costs of its annuities and
17 mischaracterized the “premium credit” and waiver of the index margin. Thus, while Conseco may
18 dispute the merits of plaintiff’s claims – whether in fact the premium credit or index margin waiver
19 provide any real value and whether Class members were subject to a sales charge – it cannot dispute
20 that the issue of whether the misrepresentations and omissions at issue are false and misleading is
21 uniform and common to the proposed Classes as a whole. Conseco’s fraudulent scheme, predicated
22 upon certain core documents presented to each Class member, therefore satisfies predominance.

23 The claims here are virtually identical to those brought in *Negrete*, 238 F.R.D. 482, which
24 also involved the sale of high cost and poor performing deferred annuities to seniors. In *Negrete*,
25 Judge Snyder of the Central District relied on the same type of common evidence, “*standardized*
26 *written marketing materials supplied by Allianz*,” including standardized consumer brochures and
27 “SOUs” (Statements of Understanding), signed by each class member, in finding predominance and
28 granting certification in a nationwide RICO action. *See Negrete*, 238 F.R.D. at 492.

1 The ruling in *Negrete* is echoed by the denial of the motion for decertification in *Iorio*,
2 another case involving the deceptive sale of annuities to seniors. In *Iorio*, Judge Sammartino of the
3 Southern District affirmed the finding of predominance with respect to the plaintiffs' fraud claim,
4 again, based on Allianz's standardized written materials. Ex. 42, *Iorio v. Allianz Life Ins. Co. of N.*
5 *Am.*, No. 05CV633 JLS (CAB), Order at 36 (S.D. Cal. July 8, 2008). Judge Sammartino recognized
6 that "[t]he uniformity of [Allianz's] written materials with the alleged misrepresentations allayed
7 concerns about any differences in the oral communications that the independent selling agents
8 made to class members." *Id.*

9 Recently, the Ninth Circuit reviewed the denial of class certification in another case alleging
10 the deceptive sale of deferred annuities to seniors. *Yokoyama*, 594 F.3d 1087. The Ninth Circuit
11 reversed and certified a class of seniors in Hawaii who purchased Midland annuities. The Ninth
12 Circuit found that because "[t]he plaintiffs' allegations . . . are that the deceptive acts or practices are
13 omissions or misstatements in Midland's own brochures[,] . . . plaintiffs will *not* require the
14 factfinder to parse what oral representations" were made to each plaintiff. *Id.* at 1093. Rather,
15 according to the Ninth Circuit, "the fact finder will focus on the standardized written materials given
16 to all plaintiffs . . ." *Id.* The same is true here.

17 The Ninth Circuit's opinion in *In re First Alliance Mortgage Company*, 471 F.3d 977 (9th Cir.
18 2006) further compels a finding of predominance. There, First Alliance loan officers made
19 standardized sales presentations to borrowers and failed to disclose hidden fees "result[ing] in a large
20 class of borrowers entering into loan agreements they would not have entered had they known the true
21 terms." *Id.* at 991. The Ninth Circuit held:

22 ***[T]his court has followed an approach that favors class treatment of fraud claims***
23 ***stemming from a "common course of conduct."*** . . . "Confronted with a class of
24 purchasers allegedly defrauded over a period of time by similar misrepresentations,
25 courts have taken the common sense approach that the class is united by a common
interest in determining whether a defendant's course of conduct is in its broad
outlines actionable, which is not defeated by slight differences in class members'
positions[.]"

26 *Id.* at 990-91.

27 As in the aforementioned cases, Conseco provided standardized sales materials and contracts
28 to all Class members that were "unquestionably designed to obfuscate" the essential characteristics

1 of its annuities. *Id.* at 985. Indeed, Conseco's written materials misrepresent and otherwise fail to
2 disclose critical features of the annuities, including the commissions, illusory premium credit and
3 index margin waiver. Conseco's systematic use of sale materials and contracts to defraud seniors
4 clearly raises a predominance of common issues.

5 2. Causation Can Be Established on a Classwide Basis

6 Causation, which "lies at the heart of a civil RICO claim," may be demonstrated on a
7 classwide basis and certainly presents no obstacle to certification here. *Poulos v. Caesars World,*
8 *Inc.*, 379 F.3d 654, 664 (9th Cir. 2004). Very recently, the Supreme Court confirmed that while
9 reliance may be used to demonstrate causation, it is not itself an element or prerequisite for a claim
10 under RICO. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 128 S. Ct. 2131, 2145 (2008).

11 "There is . . . more than one way to demonstrate the causal connection' between the
12 [defendant's] misrepresentations and an investor's injury." *McPhail*, 247 F.R.D. at 614. Plaintiff
13 here offers at least two independent methods to prove causation on a classwide basis: (a) direct
14 evidence of causation, as demonstrated through the applications and disclosure forms signed by
15 Class members demonstrating actual reliance on Conseco's written sales materials; and (b) evidence
16 establishing that plaintiff's injury flows directly from Conseco's misrepresentations and omissions,
17 thus establishing the causal link.

18 a. Contemporaneous Signed Statements by Class 19 Members Are Direct Evidence of Causation

20 Plaintiff has presented direct, contemporaneous classwide evidence of causation. All Class
21 members *twice* affirmed in writing – once on the application and again on the disclosure form – that
22 they received, reviewed and understood the Conseco sales materials presented to them. It is difficult
23 to imagine more compelling evidence of *actual* reliance and causation than contemporaneous
24 documentation – the very source of the deceptive and misleading statements – which were signed by
25 Class members themselves. Such documents insure that all Class members were subjected to the
26 *same misrepresentations and omissions* concerning Conseco's annuities.

27 In cases where, as here, the documents used to commit the fraud are common to all class
28 members and include misleading forms bearing class members' signatures, courts readily find

1 causation. *Negrete*, 238 F.R.D. at 492 (Allianz's use of a standardized disclosure form, signed both
2 the purchaser and agent, constitutes common proof of causation).

3 Indeed, in *Iorio*, Judge Sammartino found that plaintiffs had demonstrated actual, classwide
4 reliance because all class members had signed "SOUs" acknowledging that they had received and
5 read Allianz's sales and product materials at the time they purchased their annuities. *Id.* ("***Their***
6 ***signatures on the SOUs, indicating that they received and read the applicable marketing***
7 ***brochures, and their recollections that the promise of a '10% immediate bonus' factored into their***
8 ***purchasing decision are sufficient to create a jury question on actual reliance.***").¹³ The

9 circumstances are no different here, as plaintiff and all Class members were required to sign
10 disclosure forms and applications establishing their actual reliance on Conseco's written materials.

11 And, in *McPhail*, Judge Gonzalez found that the plaintiff demonstrated classwide reliance,
12 and therefore predominance, because the misrepresentations made to the class of investors were
13 "***sufficiently similar.***" *McPhail*, 247 F.R.D. at 614. In so holding, Judge Gonzalez found that "the
14 reliance requirement must encompass the rise of sophisticated marketing strategies which rely on
15 communicating similar misrepresentations to a large class of investors." *Id.* at 614-15.

16 Here, the core misrepresentations and omissions are "sufficiently similar" to satisfy
17 predominance here. *Id.* at 614. This case is even more compelling because all Class members were
18 required to sign disclosure forms acknowledging their receipt and review of Conseco's written
19 materials which include the false and misleading statements at issue.

20
21
22
23 ¹³ Similarly, in *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 339 (N.D. Ill. 1997), the district
court found that common contracts signed by class members served as evidence of actual reliance:

24 In cases like this one, where the common documents include a contract to which
25 every plaintiff is signatory, it is particularly sensible to view reliance questions as
26 secondary: by definition, parties to a contract are aware of and rely on the
representations and omissions in the contract. Thus, we conclude that common
questions predominate with respect to the RICO claim.

27 *Id.* at 339.

1 **b. Causation Can Be Inferred Because Plaintiffs' Injury**
2 **Flows Directly from the Misrepresentations and Since**
3 **Conseco's Misrepresentations Concern the**
4 **Fundamental Nature of Its Annuity Products**

5 Causation can also be inferred based on the clear and logical connection between Conseco's
6 uniform misrepresentations and the classwide injury suffered by purchasers as a result. *See*
7 Dellinger Decl., ¶¶46-47 (Class members suffered "economic losses" from Conseco's undisclosed
8 commission amounts and features such as the premium credit and index margin waiver.). As Judge
9 Snyder found in *Negrete*, "[t]his evidence of standardized written presentations, coupled with
10 plaintiffs' allegations that class members purchased annuity products far less valuable than other
11 comparable products or the prices paid for them, adequately establishes proximate causation under
12 *Poulos* at the certification stage." *Negrete*, 238 F.R.D. at 492.¹⁴

13 Moreover, causation can be inferred here as Conseco's standardized sales materials
14 misrepresented and otherwise failed to disclose the fundamental characteristics and features of its
15 deferred annuities. The decision by Class members to purchase these high cost, illiquid, poorly
16 performing products necessarily leads to the conclusion that they relied on Conseco's
17 misrepresentations. To conclude otherwise, would "deny human nature, run counter to the
18 traditional presumption in favor of actors operating under rational economic choice, and leave this
19 Court with an absurd conclusion." *Chisholm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 561 (E.D. Va
20 2000).¹⁵

21 ¹⁴ *See also* Ex. 42, *Iorio*, Order at 26 (annuity purchasers were entitled to seek damages based
22 on their reliance on Allianz's misrepresentations concerning the bonus, undisclosed commissions
23 and other costs); *Bastian v. Petren Res. Corp.*, 699 F. Supp. 161 (N.D. Ill. 1998) (holding that
24 proximate cause established under RICO where plaintiff can show omissions led to decline in value
of product purchased or invested in); *Maddox v. S. Eng'r Co.*, 500 S.E.2d 591, 594 (Ga. Ct. App.
1998) (explaining that proximate cause under RICO established where "injury flowed directly from
the defendant's misrepresentations").

25 ¹⁵ In *Chisolm*, the plaintiffs brought a RICO action on behalf of a class arising out of
26 defendant's churning scheme perpetrated against car purchasers who defaulted on their car loans and
27 did not redeem their cars on repossession. *Id.* at 544. The court certified a subclass consisting of all
28 purchasers who suffered repossession, were assessed a deficiency judgment, made payments toward
that deficiency judgment, but were never credited the sales proceeds of the repossessed cars. *Id.* at
554, 559. The court concluded that "reliance [was] self-proving as to these class members who meet
the subclass definition." *Id.* at 562.

1 **3. Damages Will Be Proven Through Common Classwide Evidence**

2 The existence of individual issues pertaining to damages serves as no bar to class
3 certification, so long as the proposed method of proof is “plausible.” *Negrete*, 238 F.R.D. at 494.
4 As held in *Negrete*, “[w]here . . . common questions predominate regarding liability, then courts
5 generally find the predominance requirement to be satisfied even if individual damages issues
6 remain.” *Id.* Indeed, the determination of damages is invariably an individual question and does
7 not defeat class action treatment. *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *Yokoyama*,
8 594 F.3d at 1094 (“In this circuit . . . damage calculations alone cannot defeat certification.”).

9 As in *Iorio*, plaintiff here seeks recovery of damages based on Conseco’s “undisclosed
10 manipulation of the yield, which effectively reduced the rate of return” for the deferred annuities
11 sold to the Classes. Ex. 42, *Iorio*, Order at 26. Class members here were sold Conseco deferred
12 annuities, the rate of return on which were burdened with the cost of high, undisclosed commissions
13 and illusory bonus features. Indeed, Conseco manipulated and increased the product spread on its
14 annuities to recover those hidden costs, substantially reducing the amount of interest credited to
15 Class members. Dellinger Decl., ¶¶32-35, 41-48. Out-of-pocket damages¹⁶ based on Conseco’s
16 undisclosed costs and fees can and will be estimated at trial using the Company’s own records and
17 data. Dellinger Decl., ¶¶47-48.

18 Because damages are capable of being “plausibly” calculated on a classwide basis, the
19 Classes accordingly should be certified.

20 **4. Common Issues Predominate in the Proof of Plaintiffs’**
21 **California Statutory and Common Law Claims**

22 Plaintiff’s California statutory claims, which include: (1) Unlawful, Deceptive and Unfair
23 Business Practices (“UCL”) (Cal. Bus. & Prof. Code §17200, *et seq.*); (2) Unlawful, Deceptive and

24 ¹⁶ Courts permit recovery of out-of-pocket damages in RICO actions. See Jed S. Rakoff &
25 Howard W. Goldstein, *RICO Civil and Criminal Law* §4.02[2][a] (2003) (“A standard measure of
26 out-of-pocket loss is monies paid out minus any value received.”); *Weiss v. First Unum Life Ins. Co.*,
27 482 F.3d 254, 258 n.2 (3d Cir. 2007) (finding insured suffered out-of-pocket damages after selling
28 his house at a below market rate as a result of insurer’s RICO scheme to discontinue disability
insurance payments); *McCullough v. Suter*, 757 F.2d 142, 143 (7th Cir. 1985) (affirming damages
under RICO for the difference between the \$23,000 plaintiff entrusted to defendant to invest in coins
and \$10,000, the value of coins plaintiff actually received).

1 Misleading Advertising (“FAL”) (Cal. Bus. & Prof. Code §17500, *et seq.*); (3) Fraudulent
2 Concealment (Cal. Civ. Code §1710, *et seq.*); and (4) violations of Elder Abuse statute (Cal. Welf. &
3 Inst. Code §15600, *et seq.*), should be certified for the same reasons explained above, as these claims
4 are predicated on the same wrongful scheme and course of conduct by Conseco in marketing and
5 selling its annuities to seniors. *See* Ex. 14, *Clark* Order at 2, 7 (certifying UCL claim); *Negrete*, 238
6 F.R.D. at 495-96 (certifying UCL, FAL and §15600 claims based on same core RICO claims).

7 Consumer fraud actions based on standardized sales practices, such as those alleged here, are
8 precisely the type of cases that California courts find present common issues of law and fact suitable
9 for class certification. *See, e.g., Gentry v. Superior Court*, 42 Cal. 4th 443, 453 (2007) (emphasizing
10 the importance of class actions in consumer litigation); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808
11 (1971) (“Frequently numerous consumers are exposed to the same dubious practice by the same seller
12 so that proof of the prevalence of the practice as to one consumer would provide proof for all.”).

13 This is especially true for claims brought under the UCL, as California courts have
14 consistently interpreted the language of §17200 broadly. *See, e.g., People ex rel. Gallegos v. Pac.*
15 *Lumber Co.*, 158 Cal. App. 4th 950, 959 (2008) (“The UCL is broad in scope . . .”), *modified*, 208
16 Cal. App. LEXIS 167 (Cal. App. 1st Dist. Feb. 1, 2008); *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal.
17 App. 4th 659, 676 (2006) (“The Legislature intended this “sweeping language” [of §17200] to
18 include “anything that can properly be called a business practice and that at the same time is
19 forbidden by law.” . . . Thus, the scope of the UCL is “broad.””); *McKell v. Washington Mut.*, 142
20 Cal. App. 4th 1457, 1471 (2006) (“The scope of the UCL is quite broad.”).

21 Here, plaintiffs’ state law claims are premised on many of the same common issues that
22 support certification of their RICO claim, namely whether Conseco’s marketing and sales materials,
23 including its “disclosure” statements, uniformly misrepresented or otherwise failed to disclose certain
24 material facts about its deferred annuities. Other common issues include whether Conseco’s marketing
25 and sales practices, implemented or encouraged by Conseco, were unlawful, unfair or fraudulent, and
26 whether Conseco’s practices were likely to deceive Class members under §17200. *See* Complaint,
27
28

¶¶162, 186-194. Another common issue is whether Conseco's deceptive conduct violated certain state statutes which constitute predicate acts under §17200's unlawful prong.¹⁷

Judge Jones of the Los Angeles Superior Court certified a similar state court case against National Western for its deceptive sale of deferred annuities to seniors. *See Clark v. Nat'l W. Life Ins. Co.*, No. BC321681 (Cal. Super. Ct., Los Angeles Cty.). In *Clark*, plaintiffs alleged that National Western violated California Insurance Code §10127.13 and the UCL by failing to disclose the surrender charges for its annuities and by targeting seniors for the sale of its annuities. Finding that such issues could be tried with common evidence, the court certified a state-wide class of California residents who had purchased such annuities. *Id.* at 7-8.¹⁸

Furthermore, with respect to plaintiff's UCL/FAL claims, Conseco cannot defeat class certification by arguing that individual proof of reliance is required. First, neither the UCL nor the FAL requires proof of individual reliance. *See In re Tobacco II*, 46 Cal. 4th 298, 316-18, 326, 331 (2009); *Mass. Mut.*, 97 Cal. App. 4th at 1289 ("liability for restitution under . . . the UCL may be found without any individualized proof of deception and solely on the basis a defendant's conduct was likely to deceive consumers").

As discussed above, plaintiff can show that Conseco's misrepresentations were the cause of his injuries because he signed the consumer disclosure form, thereby confirming that he received and read the sales materials containing the misrepresentations. *See* §II.A, above; *Vasquez*, 4 Cal. 3d at

¹⁷ Defendants' practices and conduct violate: (i) Cal. Civ. Code §§1573, 1575, 1709, 1710 and 1750, *et seq.*; (ii) Cal. Bus. & Prof. Code §17500; (iii) Cal. Ins. Code §§330-34, 762, 780, 781, 785, 787(a), (i), (k), 789.8, *et seq.*, 10127.10, and 10127.13; (iv) Cal. Welf. & Inst. Code §15610.30; (v) Cal. Penal Code §§368, *et seq.* and 484; and (vi) Cal. Corp. Code §§25230 and 25235. *See* Complaint, ¶¶162, 186-203.

¹⁸ Conseco's fraudulent scheme and common course of conduct that form the basis of plaintiffs' state law claims is also analogous to the deceptive insurance scheme in *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282 (2002). In *Mass. Mutual*, plaintiffs successfully certified a class action under the UCL and the CLRA, based on the claim that Mass. Mutual sold "vanishing premium" life insurance policies leading purchasers to believe they would receive a discretionary dividend that, over time, could be used to pay down the premiums due on such policies. *Id.* at 1291. As in *Mass. Mutual*, plaintiffs' state law claims here are based, in large part, on Conseco's manipulation of the crediting rate by imposing costs on plaintiffs which allowed Conseco to recoup the costs of commissions and bonuses.

1 814. As recently affirmed in *Iorio*, classwide adjudication of such claims is appropriate “because the
2 uniformity of written representations” and existence of the signed disclosure forms was sufficient to
3 show causation. Ex. 42, *Iorio*, Order at 36.

4 The Ninth Circuit, as stated above, has echoed this assertion, permitting certification of
5 common law fraud claims where the claims of “similar misrepresentations” “stem[] from a ‘common
6 course of conduct,’” even in the face of “‘slight differences in class members’ positions.” *First*
7 *Alliance*, 471 F.3d at 989-90. A presumption of reliance is particularly appropriate here “because of
8 the distribution of an allegedly material misrepresentation to all members of the class and the class
9 members’ subsequent purchases of the annuities as acts consistent with reliance.” Ex. 42, *Iorio*,
10 Order at 44. On these grounds, certification of plaintiff’s state law claims is warranted.¹⁹

11 **B. The Superiority of Class Action Litigation Is Established Here**

12 Superiority is demonstrated where “class-wide litigation of common issues will reduce
13 litigation costs and promote greater efficiency.” *Negrete*, 238 F.R.D. at 493. Rule 23(b)(3) sets
14 forth the relevant factors for determining whether “a class action is superior to other available
15 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).
16 “[C]onsideration of these factors requires the court to focus on the efficiency and economy elements
17 of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated
18 most profitably on a representative basis.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180,
19 1190 (9th Cir. 2001).

20 The Rule 23(b)(3) “superiority” factors weigh heavily in favor of class certification here.
21 The first factor for the Court to consider is “the likely difficulties in managing a class action.”
22 Fed. R. Civ. P. 23(b)(3)(D). The existence of manageability issues does not render an otherwise
23 certifiable class unsuited for class certification. *See Dukes v. Wal-Mart*, 509 F.3d 1168, 1192-93
24 (9th Cir. Cal. 2007) (concluding that classwide treatment was superior method because there was “at
25 least one method of managing this large class action . . . albeit somewhat imperfect”). In this case,

26
27 ¹⁹ For the same reasons, plaintiff also urges the Court to certify plaintiff’s Elder Abuse claims
28 pursuant to Cal. Welf. & Inst. Code §15610, *et seq.*, for class treatment. *See Negrete*, 238 F.R.D. at 496.

1 no significant manageability issues will arise from the nature and complexity of plaintiff's claims.
2 As explained above, the issue of liability will turn on whether Conseco engaged in a common course
3 of conduct, using misleading, standardized sales materials and contracts, to target and exploit seniors
4 in the sale of deferred annuities. Nor will damages give rise to, or otherwise create, manageability
5 concerns. Indeed, any individual issues that may arise at the damages stage will "not outweigh the
6 benefits of proceeding in a class action format." *Wiener v. Dannon Co.*, 255 F.R.D. 658, 671 (C.D.
7 Cal. 2009); *see Yokoyama*, 2010 U.S. App. LEXIS 2631, at *15-*16.

8 The second factor concerns the class members' interest in individually controlling separate
9 actions. The Class members in this case are all senior citizens, many of whom are retired and live on
10 fixed incomes. They have little incentive to litigate their claims on an individual basis because the
11 out-of-pocket expense and personal commitment necessary to litigate each claim will outweigh any
12 potential recovery. *See Negrete*, 238 F.R.D. at 495; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797,
13 809, 105 S. Ct. 2965 (1985) ("Class actions . . . may permit the plaintiffs to pool claims which would
14 be uneconomical to litigate individually."). Classwide treatment of the claims of the proposed
15 Classes, consisting of more than 26,000 seniors, is not only a much more efficient way to proceed, it
16 is likely the only realistic for these senior consumers to proceed.

17 The third factor concerns "the extent and nature of any litigation concerning the controversy
18 already begun by or against class members." Fed. R. Civ. P. 23(b)(3)(B). Plaintiff is unaware of
19 any other class case against Conseco concerning the sale of its deferred annuities to seniors. This
20 nationwide RICO action is really the only way for senior purchasers nationwide to obtain relief.

21 Finally, the Court may consider the desirability of concentrating the claims in this forum.
22 Fed. R. Civ. P. 23(b)(3)(C). This factor's "emphasis is on the forum selected, not the concentration
23 of claims." 2 Alba Conte & Herbert Newberg, *Newberg on Class Actions* §4.31 (4th ed. 2008). This
24 District is a compelling forum for litigating this putative class action because Conseco sold a large
25 share of its deferred annuities in California and because the proposed class representative resides
26 here. Additionally, plaintiff seeks certification of a California sub-class based on state law consumer
27 protection, false advertising and elder abuse claims. *See Negrete*, 238 F.R.D. at 495. Accordingly,
28 class treatment in the present forum represents an efficient and reasonable use of judicial resources.

1 Accordingly, maintenance of this suit as a class action is a fair and efficient method to
2 adjudicate the claims of all Class members without burdening the judiciary with a multiplicity of
3 duplicative lawsuits. *Id.* at 493-94.

4 **V. CONCLUSION**

5 For each of the foregoing reasons, plaintiff's motion for class certification, appointment of
6 class representatives and appointment of class counsel should be granted.

7 Respectfully submitted,

8 DATED: June 7, 2010

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on June 7, 2010, I electronically filed the foregoing with the Clerk of the
3 Court using the CM/ECF system which will send notification of such filing to the e-mail addresses
4 denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the
5 foregoing document or paper via the United States Postal Service to the non-CM/ECF participants
6 indicated on the attached Manual Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that the
8 foregoing is true and correct. Executed on June 7, 2010.

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